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IN THE
Supreme Court of the United States

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

**PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,**

Appellee.

**On Appeal From the
Supreme Court of California**

**BRIEF OF AMERICAN GAS ASSOCIATION AS
AMICUS CURIAE IN SUPPORT OF APPELLANT'S
JURISDICTIONAL STATEMENT**

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JURISDICTIONAL STATEMENT

The American Gas Association (A.G.A.) submits this brief *amicus curiae* in support of the jurisdictional statement filed by the Pacific Gas and Electric Company (appellant). The A.G.A. believes that each of the questions and issues presented by the appellant should be reviewed by this Court.¹

INTEREST OF THE *AMICUS CURIAE*

The A.G.A. is a national association representing the interests of approximately 300 member companies involved in the distribution and transmission of natural gas throughout the 50 states. Our member companies account for approximately 85

¹Written permission from the parties to this litigation to file this brief as *amicus curiae* has been obtained and has been filed with the Clerk of this Court.

percent of all domestic utility sales of natural gas to end-users thereof. The Pacific Gas and Electric Company (PGandE), appellant in this case, is a member of the A.G.A.

In this case the California Public Utilities Commission, appellee, exercising its regulatory authority, has ordered that the messages and solicitations for money of a specific third-party private organization (Toward Utility Rate Normalization, hereinafter, "TURN"), be included in four of PGandE's 12 monthly billing envelopes each year for a period of two years. The Supreme Court of the State of California, without discussion, has denied further review of the Commission's ruling.

The order of the Commission is of vital importance to, and is likely to effect, each of the publicly held members of A.G.A., which constitute the vast majority of our membership. The Commission's order is predicated upon its interpretations of the federal constitution, interpretations which have never before obtained judicial approval and which limit severely the rights of regulated utilities to communicate with customers on issues important to those companies and their customers, and to refrain from addressing other issues. The Commission's order also nullifies the right of utilities to possess and use certain private property in its discretion to provide regulated service. Because of the unusual and widespread importance of the federal constitutional issues decided by the California Public Utilities Commission, the A.G.A. is filing this *amicus curiae* brief in support of the jurisdictional statement of PGand E.²

²The concept of government-mandated access to utility billing envelopes has recently prompted similar government action in the following states. Two state legislatures have authorized access to billing envelopes by Citizens Utility Boards: *Wisconsin*: Wis. Stat. Ann. §199.01 *et seq.* (West 1979); *Illinois*: Ill. Rev. Stat. ch. 111 2/3, §901 *et seq.* (1983). Two state commissions permit access to billing envelopes by consumer representatives: *California*: California Public Utilities Commission, Decision No. 83-12-047, December 20, 1983; *New York*: New York Public Service Commission, Case No. 28655, May 14, 1984. Further, on November 6, 1984, *Oregon* voters approved an initiative petition that requires utilities to include 6 CUB mailings over an unspecified period of time in their billing envelopes. Bills are pending in *Massachusetts* and the *District*

SUMMARY OF ARGUMENT

The jurisdictional statement filed by PGandE presents genuinely important constitutional issues requiring this Court's resolution. The issues are central to the continued vitality of the First Amendment's guarantees of free speech and association as construed by this Court, and to the commercial relationships established by privately-owned utilities with customers and shareholders as those relationships are supported by the Fifth Amendment's prohibition against the taking of private property for public uses without just compensation. The California Public Utilities Commission has identified specific public policy goals, i.e., the assurance of the fullest possible consumer participation in Commission proceedings and the most complete understanding possible of energy-related issues, found them to be sufficiently compelling to justify limitations on First Amendment rights³, ruled in the absence of legal precedent and principled analysis that a portion of the space in PGandE's billing envelope is the property of all PGandE's customers, and required that PGandE's billing envelope carry the message and requests for money of a specific third party. In so doing, the Commission has created a case of first impression by construing its regulatory powers as including the power to take for "public" use without compensation PGandE's billing envelope, in violation of the Fifth Amendment, and has required PGandE to use its billing envelope as the means of disseminating the third party's speech and requests for money, in violation of the First Amendment. This Court's review is

of *Columbia* to establish CUBs and permit access to billing envelopes. Finally, citizens groups in *Nevada* and *Montana* have petitioned their respective commissions for access. Litigation concerning a state public utility commission's authority to compel third-party access to utility billing envelopes is pending in at least two states: *West Virginia-Citizen Action Group, et al. v. Public Service Commission of West Virginia, et al.*, Case Number 16512, In the Supreme Court of Appeals of West Virginia; *Consolidated Edison Company of New York, Inc. et al.*, Index No. 10762/84, In the Supreme Court of the State of New York, County of Albany.

³A.G.A. believes these public policy goals to be laudable, and obtainable by other means not implicating constitutional guarantees.

required because the Commission's novel constructions of the First and Fifth Amendments are in contravention of this Court's holdings, and cause violations of rights protected by those Amendments.

I. THIS CASE PRESENTS AN IMPORTANT ISSUE OF FEDERAL LIMITATION ON A STATE'S POWER TO TRANSFER TO UTILITY CUSTOMERS PROPERTY RIGHTS OF THE UTILITY PROTECTED BY THE FIFTH AMENDMENT

In a long line of cases construing the Fifth Amendment as a limitation on a state's power to regulate, this Court has consistently held that persons purchasing service from state-regulated utilities can thereby obtain no cognizable interests in the property purchased and used by the utility in providing that service. *See Smyth v. Ames*, 169 U.S. 466, 546 (1898) ("But it is equally true that the corporation performing such public services and the people financially interested in its business and affairs, have rights that may not be invaded by legislative enactment in disregard of the fundamental guarantees for the protection of property. The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it."); *Board of Public Utility Commissioners v. New York Telephone Co.*, 271 U.S. 23, 1 (1926) ("The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary."); *id.*, at 32 ("Customers pay for service, not for the property used to render it . . . By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock."); *United Railways & Electric Co. of Baltimore v. West*, 280 U.S. 234, 249 (1930) (" . . . the fundamental principle to be observed is that the property of a public utility, although devoted to the public service and impressed with a public interest, is still private property").

This fundamental rule of law is an indispensable element in the system of privately-owned public utility companies developed in this country, in contrast with the assumptions and goals of public-ownership. Management of private utilities are allowed to conduct the business affairs of the utility with the additional incentive of reasonable financial reward to and by the investing public. Such rewards are themselves regulated pursuant to law, but as this Court noted in *Missouri ex rel. Southwestern Bell Telephone Company v. Public Service Commission of Missouri*, 262 U.S. 276, 289 (1923):

It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of the public utility companies, and is not clothed with the general powers of management incident to ownership.

Indeed, in the last case in which the Supreme Court of California addressed squarely this issue of ownership of public utility property, *Pacific Telephone and Telegraph Company v. Public Utilities Commission of the State of California*, 34 Cal. 2d 822, 828-829 (1950), the court found clearly that "devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership and does not vest title to the property in the public."

In direct confrontation with uniform legal precedent and sound public policy, the Commission here has construed its enabling legislation as allowing it to define new state property rights and assign them to the collective body of utility customers. It has ruled that any unused space remaining in the utility's billing envelope (after the bill and any legally mandated notices are included), the use of which would not cause increased postage, belongs to those customers.⁴ The envelope

⁴The Commission described vaguely the interest of the customers as an "equity" right, with little indication of its meaning of that term. Appendix to the Jurisdictional Statement of Appellant (hereinafter "App."), at A-4.

itself, according to the Commission, remains the property of the utility. However, in order to assure that TURN's messages and requests for money are received by the utility customers, access to that envelope must be made available to TURN on a regular (4 months per year) basis.⁵

Thus, the Commission has thrown open the question of ownership of all other utility property by a discussion and order which provides no clear rationale for distinguishing, as a legal matter, between the right to use a utility's envelope and any access to or rights in use the customers may enjoy regarding any and all other property purchased and used by the utility.

This Court must vacate the Commission's order because, despite references to the "extra space" in the billing envelope, the direct effect of the order is that the billing envelope itself is commandeered and made to carry the messages and requests for money of a specific private third-party.⁶ "Extra space," which simply does not exist in the absence of what the Commission has found to remain utility property, i.e. the billing envelope, is merely an elliptical manner of referring to one of the characteristics of that envelope. An envelope can carry, and that is why it has financial value, and why the utility purchased it. The concept of "extra space" is a function of a quirk of governmentally-established postal regulations. If such regulations were established more accurately, no "extra space" would exist.

⁵ A "taking" under the Fifth Amendment occurs when a restriction on private property "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). While PGandE's Jurisdictional Statement formally presents a First Amendment question alone, the Fifth Amendment is inextricably entwined therewith. See pp. 20-22, Jurisdictional Statement, and footnotes 14 and 15 therein.

⁶ "The power to exclude has traditionally been considered one of the most treasured strands to an owner's bundle of rights." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

It is irrational to attempt to separate, for purposes of legal definition, establishment, and enforcement of rights, a physical object (to which property rights admittedly attach) from one of its characteristics. Long-standing 5th Amendment construction precludes the Commission from granting customers a property right of any kind in utility property.⁷

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF THE FIRST AMENDMENT IMPLICATIONS OF STATE ACTION ABRIDGING COMMERCIAL EXPRESSION AND REGULATING ITS SUBSTANCE

There can be no argument the PGandE's ability to use its billing envelope to assure that its customers receive information deemed relevant by the utility has been limited by the Commission's order. Four times per year, for two years, the billing envelope will be used to carry information concerning which the utility has made no determination of relevance or assistance to its customers.⁸ Certainly, no opportunity remains for argument that PGandE is not entitled to freedom of speech. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). It is an essential part of the protection afforded by the First Amendment not to speak or associate oneself with views of others. *Aboud v. Detroit Board of Education*, 431 U.S. 209 (1977). And the practical effect of the

⁷ Even *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) allowed third-party access to a privately owned shopping center on grounds the "[m]ost important" of which was that the property in question was "a business establishment that is open to the public to come and go as they please." 447 U.S. at 87. No property open to the public, even under the terms of the Commission's order, is involved here.

⁸ "In my view, state action that transforms privately owned property into a forum for the expression of the public's views could raise serious First Amendment questions." *Pruneyard*, *supra*, 447 U.S. at 97 (Justice Powell, joined by Justice White, concurring). While the public as a whole has not been granted access to PGandE's envelope, TURN's access must be read as considered by the Commission as appropriate because TURN purports to represent a substantial portion thereof.

Commission's order is clearly to do just that, i.e. the messages of TURN, which must be reasonably assumed to be contrary to those of PGandE in order to fulfill the Commission's goals are associated in the minds of the recipient customers by their mere presence in PGandE's envelope. It is unreasonable to assume that customers will separate TURN's message from its courier, PGandE, and the natural result is the imputation of concurrence and support by PGandE with and to the messages of TURN. At best, confusion is thrust upon the customer; at worst, misrepresentation.

The effect of the Commission's order is thus to dilute substantially the commercial speech capabilities of the utility.⁹ The billing envelope is the means selected by management to collect accounts receivable and to communicate with its customers.

It has been true that acrimonious debate sometimes occurs between a utility and those purporting to represent independently the interests of its customers. For example, natural gas utilities typically take a longer-range view of what is a prudent investment in future supply than commission-appointed advocates who often seek cost-cutting in its most immediate and current forms. Hence the natural result of messages critical of a utility business decision is to put pressure on the utility to respond and answer what it considers misleading statements. As Justice Powell has noted, where private property is used pursuant to law to make available the speech of a third-party, the property owner "has lost control over his freedom to speak or not to speak on certain issues." *Pruneyard, supra*, 447 U.S. 74, at 99.

⁹Clearly, the utility could simply pay extra postage and include its newsletter along with the third-party messages. The point is that the utility's envelope has been commandeered to carry the third party messages in the first place. As Chief Justice Burger observed in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254 (1974), governmental coercion of an enforceable right of access to the means of speech publication "at once brings about a confrontation with the express provisions of the First Amendment. . . ."

Utilities clearly have a substantial interest in making efforts to communicate with their customers because of the competition with providers of other forms of fuel. Thus, the need to strengthen and preserve the voluntary commitment the customer has for the particular service provided by the utility is apparent. The pay-back implications of conversion from one form of fuel to another are often a matter of discussion in the public press and utility management may decide, not without some risk of alienating its customers who are accustomed to receiving and immediately trashing unsolicited messages in the mail, to speak to its customers for these reasons and/or to speak about public issues of concern.

The utility thus becomes a known, recognizable source of information and is understood to be a single voice with specific views. The value of the envelope used to carry its messages may vary from time to time, as issues float in and out of the public's eye, and the need for timely utterance of a particular message thereby grows or decreases. The envelope will also contain legally mandated notices about how the machinery of government is working and the effects thereof on the customer. But the billing envelope, simple as it may be, has often been the individual piece of private property used by management to keep this commercial relation of buyer and seller alive. The order's direct effect is to use this envelope to carry messages which may well injure that commercial relationship.

The limitation placed by the Commission upon the utility's right to engage in meaningful commercial speech to the degree it deems necessary is constitutionally defective because the order is based on the content of the speech required to be given access to the billing envelope. *Consolidated Edison v. Public Service Commission*, 447 U.S. 530 (1980). The infirmity of the Commission's limitation of speech when measured against this standard is that the Commission's finding of a compelling state interest was based directly upon a perceived need to upgrade the content of any public debate on Commission-related matters by replacing, in the "extra space," the speech of PGandE with the speech of TURN. The content of PGandE's speech was simply deemed insufficient to provide

the benefit to customers required by an "efficient" use of the extra space.¹⁰ Straightforwardly, the Commission stated that "[i]t is reasonable to assume that the ratepayers will benefit *more* from exposure to a variety of views than they will from only that of PGandE." App., at p. 17 (emphasis added).

The Commission ordered the invasion of the utility's property in order to advance its interest in customers having as much information as possible about commission proceedings and thereby to assist the Commission in its duties, while describing its orders as based on "a purpose which significantly benefits" customers. App., at p. 51. Customer knowledge of issues pending before the Commission is a worthy goal; however, there are diverse and practical means of supporting such a marketplace of ideas, both existing and reasonably available, including the allowance of intervenor fees already provided, public funding of mailing by groups such as TURN, and direct solicitations by those groups. See Jurisdictional Statement, at pp. 24-25. None of those avenues involve a limitation of PGandE's constitutional rights and hence are indicative of the informity of the means selected by the Commission. For the breadth of government abridgement of First Amendment rights "must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

¹⁰ The "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

CONCLUSION

Probable jurisdiction should be noted and plenary consideration of this appeal should be granted.

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